Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1975

NO. 75-171

J. KENNETH JENSEN,

Petitioner,

vs.

JOSEPH A. KILGARIF, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

PETITIONER prays that a Writ of Certiorari issue to review the Opinion and Judgment of the Court of Appeal which affirmed

the dismissal of petitioner's claim for relief for deprivation of his civil rights. The complete title of this matter is J. KENNETH JENSEN vs. FRANCIS E. GALLAGHER, BONSALL NOON, ROSCOE S. WILKEY, ROBERT W. CONYERS, ELI H. LEVENSON, WILLIAM T. LOW, DANIEL C. LEEDY and DOUGLAS WOODWORTH.

OPINION BELOW

Petitioner complained to the District Court under 42 U. S. C. 1983 and 1985(3) of a deprivation of his citizenship rights by several judges of the Superior Court of California for the County of San Diego. The District Court, the Honorable Gordon Thompson, Jr., Judge dismissed petitioner's complaint on motion prior to the filing of a responsive pleading. The basis of dismissal (Appendix A) was that petitioner failed to state a claim upon which relief can be granted and that the respondents were immune from suit. The Court of Appeals affirmed, holding that judicial immunity protected the acts

of these persons even before a hearing to determine the truth of the allegations and any defenses to them.

JURISDICTION

The judgment of the Court of Appeal was entered February 18, 1975 (Appendix B). A timely petition for rehearing was denied on March 24, 1975 (Appendix C). Petitioner's suggestion for a hearing en banc was disregarded because petitioner omitted from the cover of his petition that such a suggestion was inside (Appendix D). Petitioner moved the Court for an extension of time to change the cover of his petition (Appendix E). The Court refused to allow petitioner to file this motion by order filed May 17, 1975. (Appendix F).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. May a complaint be dismissed because of the respondents' immunity from liability

under the Civil Rights Act before a trial is held to determine whether the respondents are entitle to immunity for their actions?

2. May certain conduct of judges be outside of their jurisdiction and official function so as not to entitle them to immunity from liability under the Civil Rights Act?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOKED

Petitioner invokes the Civil Rights Acts now codified in 42 USC 1983 and 1985(3), and in particular the passages which state EVERY person who subjects another to deprivation of his citizenship rights shall be liable to the party injured in an action at law.

In addition, petitioner invokes the First and Fourteenth Amendments to the United States Constitution. Those portions of the First Amendment concerning the establishment of religion, the freedom of speech and the clauses of the Fourteenth Amendment regarding the equal protection and due process of law are invoked.

STATEMENT OF THE CASE

1. The jurisdiction of the federal court was invoked under 28 USC 1343 concerning civil rights cases. Petitioner, a California attorney, has been practicing for more than eleven years, principally in trial work in San Diego County. In December 1970, petitioner began wrapping his head with a traditional sikh's turban after he had undergone a crainiotomy. Since that time he never appeared in any court without his traditional head covering during hundreds of appearances, including lengthy jury trials throughout the state in both state and federal cases.

2. None of the judges objected or even commented on petitioner's head covering until the morning of November 12, 1971. On that morning, petitioner appeared with his usual head wrapping as he had been doing for almost a year, in the civil presiding department of the San Diego Superior Court. He was representing Dr. Oates. After a brief discussion of the case, the presiding judge, Joseph A. Kilgarif, without objecting or commenting about petitioner's head covering, assigned the case to Eli H. Levenson for trial.

3. However, Judge Levenson refused to hear the case without first interrogating petitioner as to his religious beliefs. The petitioner would not submit to such interrogation whereupon Judge Levenson ordered the case back to the presiding department.

4. Upon return to the presiding department Judge Kilgarif now demanded petitioner to submit to such an interrogation or immediately leave the courtroom. The petitioner left the courtroom and Dr. Oates' case was continued to December 3, 1971. (Exhibit "B" in the Appeal to the Ninth Circuit is a transcription of the baliff being ordered not to permit petitioner into the presiding department of the San Diego Superior Court unless he removed his head covering).

5. It was now necessary for another attorney to appear on behalf of petitioner and Dr. Oates in the civil presiding department on December 3, 1971. Dr. Oates' case was then

assigned for trial to Judge George A. Lazar who also refused to try the case because the file had been marked by the presiding department with an order. The order was, not to permit petitioner in a department of the Superior Court with his usual head covering. However, Dr. Oates' case was reassigned for trial to Judge Robert O. Staniforth who did not agree with the order and petitioner tried the case wearing his usual head covering.

6. After that trial petitioner continued to appear in department of the San Diego Superior Court wearing his turban. For instance, he was not restricted by his appearance from appearing in the criminal presiding department and continued to try cases before juries without changing his appearance.

7. However, on December 17, 1971 when petitioner appeared in the Domestic Law and Motion Department of the San Diego Superior Court, the presiding judge, Francis E. Gallagher summoned him to come before the bench. The

judge then told petitioner of a Superior Court Rule which excluded male attorneys from appearing in court with their heads covered. Petitioner had not been notified of the rule and requested a hearing because he had been appearing for more than a year wearing his turban before this judge and others of the Superior Court without even a comment.

8. The judge refused to consider petitioner's request for a hearing and instructed the baliff not to allow petitioner in the courtroom. After petitioner left the courtroom, his client's petition was dismissed without a hearing by removing it from the calendar.

9. Unknown to the petitioner, the respondents had held a secret meeting on December 8, 1971 and agreed to adopt a rule which would affect only the petitioner by barring some male attorneys from appearing in court with their heads covered. The rule ordered all of the departments of the San Diego Superior Court to prohibit petitioner from appearing notwithstanding the fact that not all the

ed broadly and indiscriminately but only to the extent necessary to effect its purposes. Pierson v. Ray, 386 U. S. 547, 87 S. Ct. 1213, 18L. Ed. 2d 288 (1967). When a judge makes a decision in a case brought before him, there are obvious reasons for not permitting the losing party to sue him. But when several judges conspire to and commit the acts in this case against an attorney who is not a party to a pending matter, the valid purposes for granting immunity no longer exist. Protecting the respondents from answering only serves to promote capricious behavior.

> To deny recovery to a person injured by the ruling of a judge acting. . . out of personal motive would be 'monstrous'. Pierson, supra. 386 U. S. at 564.

3. The record before the Court of Appeals is insufficient to sustain its judgment. Under its own decisions, Robichaud v. Ronan, 351 F. 2d 533 (9th Cir. 1965) and Gregory v. Thompson, 500 F. 2d 59 (9th Cir. 1974), the defense of immunity is a question of fact. The allegations that the respondents' conduct was outside the course and

scope of their official duties and that they knew they lacked jurisdiction for their acts can not be finally determined on a motion before answer. It is because immunity from suit is not an absolute right and the conduct in question must be carefully considered that a dismissal on motion is improper. A trial will determine if the respondents' conduct was a good faith exercise of their official duties, which would entitle them to immunity.

> We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence might make the answer to the questions clearer. Borden's Farm Products Co. v. Baldwin (1934) 293 U. S. 194, 213 55 S. Ct. 187, 79 L. Ed. 281.

The Court of Appeal protected the respondents from accounting for an abuse of their authority.

4. The First Amendment protects the citizen's right to choose his beliefs and prohibits officers of the state from dictating what they consider to be a proper religion. These

judges, under color of state law, required of petitioner an affidavit concerning his religious beliefs, and if it was not what they considered a valid religion, prohibited him from appearing in court. Furthermore, respondents excluded the petitioner from practicing his profession without due process. If judicial officers are immune from compensating those citizens whose rights they infringe, then 42 U. S. C. 1983 is not a guarantee of constitutional rights. One need only be in the position of ostensibly enforcing the law to have the power to break it with impunity. Regardless of his title or position, no person is above having to answer for his conduct.

Therefore, petitioner requests this Court to issue its Writ of Certiorari to the Court of Appeals for the Ninth Circuit and further order the judgment of that court reversed, with instructions to vacate the judgment of the District Court and proceed to trial.

Respectfully Submitted,

J. KENNETH JENSEN

APPENDIX

ENTERED

MAY 18 1973

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [signature] DEPUTY

FILED

MAY 18 1973

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [signature] DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

J. KENNETH JENSEN,

Plaintiff,

v.

JOSEPH A. KILGARIF,
GEORGE A. LAZAR,
FRANCIS E. GALLAGHER,
BONSALL NOON,
ROSCOE S. WILKEY,
ROBERT W. CONYERS,
ELI H. LEVENSON,
WILLIAM T. LOW,
DANIEL C. LEEDY and
DOUGLAS WOODWORTH,

Defendants.

NO. 72-496-GT

MEMORANDUM OPINION AND ORDER

Plaintiff Jensen in this action claims that he has been denied, under color of state law, his rights, privileges and immunities secured by the constitution and laws of the United States. Jurisdiction is founded under the Civil Rights Act, 28 U.S.C. §§1331 and 1343. Specifically, plaintiff has alleged that defendants have refused to allow him in their courtrooms until he explains the nature and purpose of the headpiece (turban) he wears. It is his contention that such action is an attempt to coerce and intimidate him into being interrogated as to his religious beliefs. Plaintiff prays for general damages in the sum of $500,000 and for punitive damages in the sum of $500,000.

Presently before the court is the motion of defendants to dismiss the complaint of plaintiff Jensen in that the complaint presents no substantial constitutional question and for failure to state a cause of action upon which relief can be granted.

In order to grant defendant's motion to dismiss under F.R.C.P. 12(b)(6) this court must find, after reviewing all issues and resolving all doubts in favor of plaintiff, that the complaint states no valid claim for relief. Brown v. Brown, 368 F.2d 992 (9th Cir. 1966). However, mere unsupported conclusions of fact or mixed fact and law are not admitted by a motion to dismiss. Interstate Natural Gas Co. v. So. Cal. Gas Co., 209 F.2d 380 (9th Cir. 1953). In this case, the court is of the opinion that the proper standard has been met and that the complaint should be dismissed.

Plaintiff contends that defendants conspired to and did deprive plaintiff of his rights by attempting to coerce and intimidate the plaintiff into being interrogated as to his religious beliefs in regard to his wearing the head covering. Thus, plaintiff believes that his First Amendment guarantees of freedom of religion have been infringed.

Traditionally, the First Amendment infringements of freedom of religion have been classified into two general areas. First, the establishment clause which forbids sponsorship, financial support, and active involvement of the sovereign in religious activity. Early v. DiCenso, 403 U.S. 602 (1971). Second, the free exercise clause, which like the establishment clause, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. School Dist. of Abington Tp. v. Schempp, 374 U.S. 203 (1963).

The facts show that the establishment clause prohibition does not apply in this case. There is no involvement by the state or federal government in religion. It is also true that the free exercise clause does not apply. At no time has plaintiff asserted that his denial of courtroom admission is based on religious grounds. Similarly, plaintiff does not allege that he wears such traditional headcovering as part of his religious belief.

Courts should not weigh the merits of any religion and how it is practiced in conjunction with courtroom dress and conduct rules. However, that question is not met in the present case; no religious right of the plaintiff has yet been infringed. Courts may inquire as to whether a participant is sincere and bona fide in harboring a certain belief and may inquire whether a participant holds such a belief honestly or for some ulterior motive. See McMillan v. State, 265 A.2d 453 (1970). The armed forces and the selective service system have inquired far deeper into the sincerity of religious beliefs and tenets of individuals seeking conscientious objector status and have been consistently upheld. Gillette v. U.S., 401 U.S. 431 (1970). The plaintiff seeks similar privileged status (in regard to his courtroom appearance) yet will not bridge a single question as to his sincerity or motivation. More than this is necessary for the plaintiff to adequately allege a First Amendment infringement of freedom of religion.

Further, the doctrine of judicial immunity will protect the actions taken by a judge in the performance of his duties. Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872). Since the alleged infringement concerns the barring of plaintiff from each of the defendants courtrooms only, their actions can be construed

in no other way than acting within the scope of their official duties. It is well established in California that a court of record has inherent powers requisite to its proper functioning as an independent constitutional department of government, including the power to preserve order in the court, to control the conduct of those attending court and to control the courtroom. See People v. Rainey, 224 Cal.App.2d 93, 97-98 (1964); Cantillon v. Superior Court, 150 Cal.App.2d 184, 187 (1957); Pedrow v. Pederoff, 77 Cal.App.164, 175 (1926); Platnauer v. Superior Court, 32 Cal.App. 463, 473 (1917).

In accordance with the foregoing, the motion of defendants to dismiss is hereby granted.

IT IS SO ORDERED.

Dated: 5/8/73

GORDON THOMPSON, JR., Judge
United States District Court

Copies to:

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB 18 1975
CLERK

J. KENNETH JENSEN, Appellant,	)	No. 73-2549
v.	)	
JOSEPH A. KILGARIF, et al., Appellee.	)	MEMORANDUM

Appeal from the United States District Court for the Southern District of California.

Before: ELY, GOODWIN, and SNEED, Circuit Judges.

The judgment of dismissal of this civil rights action against state judges is affirmed on the authority of Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974), and Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965). The act complained of was reasonably related to the exercise of judicial function, and thus, under Gregory and Haldane, cannot give rise to liability for money damages. Cf. Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965).

APPENDIX "B"

FPI-Sandstone
3-18-73—5056—1000

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 24 1975
U.S. COURT OF APPEALS
CLERK

J. KENNETH JENSEN, Appellant,	)	No. 73-2549
v.	)	
JOSEPH A. KILGARIF, et al., Appellee.	)	ORDER

Appeal from the United States District Court for the Southern District of California.

Before: ELY, GOODWIN, and SNEED, Circuit Judges.

Appellant's petition for rehearing, filed March 4, 1975, is denied.

The suggestion for en banc rehearing, contained within the body of the petition, is disregarded by reason of the appellant's failure to comply with this court's Rule 12.

APPENDIX "C"

FPI-Sandstone
3-18-73—5056—1000

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. KENNETH JENSEN, Appellant, vs. JOSEPH A. KILGARIF, et al., Respondents.	)	NO. 73-2549 PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPENDIX "D"

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. KENNETH JENSEN, Appellant, vs. JOSEPH A. KILGARIF, et al., Respondents.	)	NO. 73-2549 MOTION FOR EXTENSION OF TIME

Appellant moves this Court pursuant to Federal Rule of Appellate Procedure 26(b) for an order enlarging time to re-file his petition for rehearing and suggestion for rehearing en banc up to and including May 10, 1975.

The reason for appellant's motion is that his petition, timely filed on March 4, 1975 simply failed to state on the cover that the body of the petition contained a suggestion for hearing en banc.

Appellant requests this additional time to comply with this Court's Rule 12.

DATED: April 22, 1975

Respectfully submitted,

J. KENNETH JENSEN

APPENDIX "E"

J. KENNETH JENSEN
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Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. KENNETH JENSEN, Appellant, vs. JOSEPH A. KILGARIF, et al., Respondents.	)	NO. 73-2549 ORDER EXTENDING TIME

Good cause appearing,

IT IS ORDERED that the time for filing the Petition for Rehearing and Suggestion for Hearing en banc in this cause with the Clerk of the United States Court of Appeals for the Ninth Circuit is extended to and including May 10, 1975.

DATED:

JUDGE OF THE COURT OF APPEAL

MAY 27 19

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. KENNETH JENSEN, APPELLANT, V. JOSEPH A. KILGARIF, ET AL., APPELLEES.	)	No. 73-2549 ORDER

FILED
MAY 19 1975
EMIL E. MELEI, JR., CLERK
U. S. COURT OF APPEALS

Before: ELY, GOODWIN, and SNEED, Circuit Judges.

The court declines to allow the filing of appellant's motion for extension of time to refile his petition for rehearing with a suggestion for rehearing en banc.

/S/ Walter Ely

/S/ Alfred T. Goodwin

JOSEPH T. SNEED

United States Circuit Judges

BEST COPY AVAILABLE

APPENDIX 'F'

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1975

NO. _____

J. KENNETH JENSEN,

Petitioner,

vs.

JOSEPH A. KILGARIF, et al.,

Respondents.

CERTIFICATE OF SERVICE

I, J. KENNETH JENSEN, being first duly sworn, deposes and says:

I hereby certify that on July 30th, 1975 a copy of this petition for a Writ of Certiorari was mailed, postage prepaid, to the following:

Lloyd M. Harmon Jr. (three copies)
County Counsel
302 County Administration Center
San Diego, California 92101

The United States Court of Appeals
for the Ninth Circuit
7th and Mission
San Francisco, California 94101

The United States District Court of Appeals
325 West F Street
San Diego, California 92101

The Honorable Gordon Thompson Jr.
325 West F Street
San Diego, California 92101

I further certify that all parties required to be served have been served.

J. KENNETH JENSEN
Petitioner

Duly witnessed and sworn before me this 30th day of July, 1975.

OFFICIAL SEAL
JANIS E. SHEPHERD
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires Jan. 14, 1978

Janis E Shepherd
NOTARY PUBLIC